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IN THE

# Supreme Court of the United States

October Term, 1958

No. 302

GLADYS L. MATTHEWS, ADMINISTRATRIX OF THE ESTATE OF THEODORE A. MATTHEWS,
*Petitioner*

v.

PHILLIP MATTHEWS, ADMINISTRATOR, ESTATE OF SAMUEL MATTHEWS, DECEASED,
*Respondent*

## PETITION FOR WRIT OF CERTIONARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

*To: The Honorable The Chief Justice of the United States and Honorable Associate Justices of the Supreme Court of the United States.*

The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered June 26, 1958 affirming orders of the United States District Court denying petitioner's Petition to Revoke Letters of Administration granted to respondent and denying petitioner's Motion to Reconsider said order.

## OPINIONS BELOW

There was no opinion in the United States District Court for the District of Columbia, but the Court made

findings of fact in its order of July 24, 1957, which are found in the certified transcript of record submitted herewith. (J.A. 55)

The opinion of the United States Court of Appeals rendered June 26, 1958 is not yet reported but is contained in the certified transcript of record submitted herewith at page 73 and is appended to this petition.

There was no petition for rehearing.

## JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was dated and entered June 26, 1958. There was no petition for rehearing.

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

## QUESTIONS PRESENTED

### I

Whether the Court of Appeals erred in presuming a common law marriage between the decedent and respondent's mother in light of the fact that respondent's mother left the decedent and subsequent to said common law marriage entered into a ceremonial marriage without benefit of a divorce, during decedent's lifetime?

### II

Whether the Court of Appeals deprived petitioner of property without due process of law when it presumed a common law marriage without inquiring into the facts constituting the common law marriage on the ground that respondent's mother had waived her rights in decedent's estate as such inquiry was fundamental to petitioner's property rights?

III

Whether the Court of Appeals erred in presuming legitimacy of respondent in the absence of a valid marriage as our code provides legitimation where there is a marriage and subsequent acknowledgment of issue.

## STATUTES INVOLVED

Title 18, Section 106, D.C. Code (1951) provides:

> If any man shall have a child or children by any woman whom he shall afterwards marry, such child or children; if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be legitimated and capable in law of inheriting and transmitting heritable property as if born in wedlock.

Title 18, Section 709, D. C. Code (1951) provides:

> If there be a brother or sister, or child or descendant of a brother or sister, and no child, descendant, or father or mother of the intestate, the said brother, sister, or child or descendant of a brother or sister shall have the whole.

Title 20, Section 204, D. C. Code (1951) provides:

> If the intestate leave a widow or surviving husband and a child or children, administration, subject to the discretion of the court, shall be granted either to the widow or surviving husband or to the child, or one or more of the children qualified to act as administrator.

Title 20, Section 207, D. C. Code (1951) provides:

> If there be neither widow or surviving husband, nor child, nor grandchild, nor father, nor mother to act, brothers and sisters shall be preferred.

Amendment V to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

On May 8, 1957, respondent filed a Petition for Letters of Administration of the Estate of Samuel Matthews, deceased (J.A. 1); alleging among other things that decedent had died April 16, 1957, leaving surviving as his next of kin and heirs at law, respondent, his sister, Bernice Gordon and Theodore A. Matthews, his brother, of whom your petitioner was then Conservator, and that the decedent was divorced; and further alleging that decedent's brother Theodore and respondent's sister, Bernice had been served and had filed waivers consenting to nominal general bond. On May 27, 1957, respondent filed an Amended petition (J.A. 4) stating that his father left a widow, Irene Matthews Bailey, who had filed a waiver of all interest in his estate (J.A. 8) and a daughter, Bernice Gordon who had waived over to respondent consenting to Administration under Special Bond. On May 28, 1957 an Order granting Administration with Special Bond was entered. (J.A. 8). Thereafter, upon representation of petitioner's then counsel, Robert M. Williams, bond was withheld by the office of Register of Wills, D. C. (J.A. 9) pending petitioner's filing a Petition to Revoke Letters of Administration. On May 31, 1957 a Petition to Revoke Letters of Administration was filed by petitioner (J.A. 12), then conservator of the estate of Theodore A. Matthews, alleging among other things that Theodore A. Matthews, brother of decedent had never been served nor filed a waiver to respondent; that Samuel Matthews left

only one heir at law and next of kin, namely his brother, respondent's then ward, Theodore A. Matthews; that the Administrator was not a son capable of inheriting under our law and qualifying as Administrator as his mother and the decedent had never been married; that as a matter of fact respondent's mother is presently married to another person and has been so married for a number of years during decedent's lifetime; and that petitioner be appointed in behalf of her ward, Theodore A. Matthews, the only heir at law of Samuel Matthews, deceased. An affidavit in reply was filed by respondent alleging among other things, that decedent and respondent's mother Irene Bond Bailey were parties to a valid common law marriage and that although his mother had married during decedent's lifetime her failure to obtain a divorce was based on her misconception of the law (J.A. 20); and she waived all interest in his estate. Thereafter petitioner filed a supplemental affidavit in support of her petition to Revoke Letters of Administration in which reference was made to the conservatorship proceedings on her ward Civil Action #1107-56 in which decedent when being interviewed by her ward's then lawyer, Russell Morris, denied ever being married to respondent's mother (J.A. 53) in the hearing of George Ransome who was present during said interview. Thereafter, the matter was heard in Motions Court July 24, 1957 and on that date Judge Wilkins entered an order denying petitioner's Petition to Revoke with prejudice. (J.A. 55). In his Order he found that a valid common law marriage existed between decedent and respondent's mother and that respondent and his sister Bernice Gordon are legitimate. Thereafter a Motion to Reconsider said Order denying Petition to Revoke Letters of Administration was filed August 1, 1957 (J.A. 56) in which petitioner averred the court erred among other reasons by presuming a valid common law marriage between decedent and respondent's mother when respondent's mother's own act of marrying during decedent's lifetime contravened

the court's finding of a valid common law marriage between her and decedent. On August 8, 1957, respondent filed a Reply to the Motion to Reconsider Petition to Revoke Letters of Administration. (J.A. 66). On October 1, 1957 the Motion to Reconsider etc. was denied without a hearing. (J.A. 70). From the Judgment denying Petition to Revoke Letters of Administration with prejudice and order denying Motion to Reconsider said Judgment, timely Notice of Appeal was made and an appeal accordingly processed.

While the proceedings were pending in the Appellate Court petitioner's ward, whom she had married in October, 1956 died and after the grant to Petitioner of Letters of Administration on the Estate of Theodore A. Matthews, on April 16, 1958, she was substituted as Administratrix of the estate of Theodore A. Matthews, appellant. A copy of said order of substitution of parties on account of death is contained in the certified transcript of record submitted herewith at page 77.

## ARGUMENT

### I

The chief issue in the case was whether respondent, administrator below, was entitled to Letters of Administration on the estate of Samuel Matthews as to be so entitled he would have to be the child of the decedent. D.C. Code Title 20, Section 204, (1951). Otherwise, petitioner, administrator of the estate of decedent's brother, Theodore A. Matthews, would be entitled to Letters of Administration. D. C. Code, Title 20, Section 207, (1951). It is settled in this jurisdiction, that a "child" as referred to in Title 20, Section 204 means a legitimate child. Di Giovanni v. Di Giovanantonio 98 App. D. C. 147 n. 1, p. 148. It is also well settled in our jurisdiction that in order to legitimate a child, marriage with the father and his subse-

quent acknowledgement of the child must be shown. D. C. Code, Title 18, Section 106. (1951); Blethyn v. Badger 80 F. Supp. 962.

It is the petitioner's contention that no legal marriage was ever entered into between respondent's mother Irene Bond Bailey and the decedent; that the relationship was admittedly illicit in its inception, by the affidavit of the respondent's mother, (J.A. 39); that only her self-serving statement in that same affidavit is offered to show a change in the relationship; and that in 1937, six years after she left the decedent, Irene Bond entered into a ceremonial marriage with George Bailey (J.A. 51), which action overcomes all presumptions of a prior common law marriage with decedent. The Court below states that there was no legal impediment to the marriage and that they lived together as man and wife until their separation. (App. 15). The Court of Appeals then went on to nullify petitioner's chief attack on the legality of a common law marriage in this case, the subsequent ceremonial marriage of respondent's mother without a divorce, by stating that since respondent's mother waived all claim as "widow" in this case, they were not called upon to adjudicate her status. (App. 15).

The weight of authority is contrary to the presumption of a valid common law marriage in this case. Where an actual marriage by one of the parties to an alleged common law marriage with a third person takes place during the lifetime of the other party to alleged common law marriage, the presumption of a common law marriage is met and overcome. One of the leading cases on this subject is Jones v. Jones, 48 Maryland St. Reports 391, where appellant attempted to establish his legitimacy in an administration proceeding by proving a common law marriage between the decedent and his mother. The Court in holding that appellant was not the lawful issue of the decedent and appellant's mother stated at pages 397, 398:

> ". . . if Andrew D. Jones, decedent (sic) was in fact married . . . during the life of Hennie, the mother of the appellant, all mere presumptions of a previous marriage of Andrew with Hennie, founded simply upon habit and repute are at once overthrown. . . . The reasoning upon which this decision rests is that in such a case the presumption of a marriage arising from cohabitation and repute is met and overcome by the stronger presumption that a man will not incur the guilt of felony and the danger which attends it by marrying another woman during the life of one to whom he had previously been lawfully married . . ."

To the same effect are: Senser v. Bower, 1 Penn. Rep. 450; Gaines v. Relf 53 U.S. 472, in which the Supreme Court in circumstances somewhat similar, where one of the parties to an actual ceremonial marriage confessed or declared he had another wife living said in the syllabus:

> "To hold that either of the parties could by mere declaration establish the fact that a marriage is void would be an alarming doctrine".

Likewise, in Schwingle v. Reifer, 135 S. W. 194 the court held:

> ". . . The weight of authority, and the decisions . . . support the proposition that the presumption of an actual marriage from the fact of continued cohabitation is rebutted by the fact of a subsequent permanent separation, without apparent cause, and the actual marriage soon after of one of the parties . . ."

Similarly, in Maher v. Maher, 56 N. E. 124, where an appeal was presented to determine the status of a common law widow, who alleged that decedent's subsequent ceremonial marriage to another person following their separation was invalid, the court in declaring the lower court's ruling that alleged common law wife was lawful widow was erroneous, said at page 126:

> "Cohabitation and repute do not alone constitute the marriage as that can only depend on the mutual consent of the parties. The recognition of the marriage

relation by the parties themselves and by friends and relatives . . . being the mere manifestations that the parties have consented to contract . . . causes those facts to only raise a presumption of the actual contract . . . a presumption of that character may be overcome by other presumptions springing from their acts after cohabitation between them has ceased . . ."

I

To the same effect are In re Wallace's Estate 25 Atl. 260; Norman v. Goode, 38 S. E. 317; and Jenkins v. Jenkins, 83 Ga. 283; 9 S. E. 541. In addition, In re Campbell's Estate 108 P. 669 where petitioners' claimed a share of the estate based on their birth during marriage by cohabitation and repute between decedent and their mother, the contestants claimed decedent formally married during petitioners' mother's lifetime. The Court held at page 675:

". . . if it be insisted that a marriage arose from cohabitation and repute, this presumption is removed by proof of decedent's (sic) formal and lawful marriage in this State . . ." (citing Jones v. Jones op. cit.).

Likewise, in O'Leary v. Lawrence 113 Atl. 638 nieces and nephews disputed legitimacy of decedent's grandchild because prior to the marriage upon which heirship was claimed decedent's wife was party to a marriage by habit and repute. In denying this argument, the Court said at page 640 (4):

". . . Even if there was a presumption of marriage . . . this presumption would be overcome by the subsequent relations between her and O'Leary which would have been criminal. . . . The presumption of innocence in the second case would overcome the presumption of marriage in the first even if otherwise there were enough evidence to raise such presumption."

And finally, In re Blackhawk Estate 158 Pac. 168 (1944) where the administrator claimed the entire estate and other heirs filed a petition claiming as heirs. Their claim was allowed and from this allowance, the adminis-

trator appealed. The heirs' claim was based on the argument that the marriage between their ancestor and the administrator's ancestor was invalid as prior thereto the administrator's ancestor was party to a common law marriage of which two children were born. In reversing, the Court said at page 173 citing Jones v. Jones, 45 Md. 144; 48 Md. 391:

> ". . . The rule seems to be that the presumption of marriage from cohabitation and repute may be rebutted by evidence of separation and subsequent ceremonial marriage of one of the parties to a third person."

Also to the same effect see: In re Sloan's Estate, 50 Wash. 86; 17 LRA (NS) 960.

This rule, that where a marriage between A and B founded simply upon habit and repute, is overcome by proof of a subsequent actual marriage between A and C during the lifetime of B has as illustrated been consistently followed by the courts of appeals in many jurisdictions. Here the rule was completely disregarded by our Appellate Court despite the admission by the alleged common law wife of her ceremonial marriage in 1937, six years after she left the decedent, which marriage presisted for twenty years during decedent's lifetime and still it subsists. Petitioner asserts this ruling contrary to the holdings of courts of appeals throughout the country on the same question, entitles her to a writ of certiorari.

## II

Apparently our Court of Appeals justifies its ruling, presuming a common law marriage, though it contlicts with other courts of appeals' decisions because respondent's mother had signed a waiver of all her rights as "widow" in her alleged common law husband's estate and the Court therefore was not called upon to adjudicate her status. (App. 15). This is faulty reasoning on several counts. The waiver of all her rights as "widow" is not

evidence that there was a common law marriage and this woman therefore a "widow". An opposite conclusion could just as easily have been drawn based on the abnormalcy of a person's waiving such a valuable right. In this instance her share, if held as the widow, would have been substantial. This assumption by our Court of Appeals that there was a right to have been waived is erroneous. The hub of petitioner's contention below was that no such right existed as there was no legal marriage between respondent's mother and the decedent. "Waiver is the surrender or relinquishment of an existing right." Words and Phrases, Vol. 44 (Perm. Ed.) p. 518. Further, the issue of her status is one with the issue of whether or not a valid common law marriage existed upon the resolution of which issue the basic property rights of petitioner depend. If there were no marriage respondent would not be a "child", under our law, capable of inheriting and, petitioner's claim in behalf of the estate of Theodore A. Matthews would be allowed. D. C. Code Title 18, Section 709; Title 20, Section 204. (1951.) To deprive a person of his property rights upon the waiver by some third person of his own presumed pecuniary interest amounts to a deprivation of property without due process of law. It is settled that a waiver will be inoperative or void if it infringes upon the rights of others. In Reis-Moran Lumber Company v. Putney Roofing Company, 147 S. W. 2d 172 where one of the party defendants on appeal had waived the requirement of a written notice of appeal, the other party defendant appeared specially to affirm the lower court's judgment as he had not received written notice of appeal. The court in denying appellant's plea to proceed with the appeal against this defendant said, at page 175 citing 27 R.C.L. Sec. 3, Page 907:

> ". . . a waiver is not allowed to be asserted where it would infringe upon the rights of others . . ."

In this case at the hearing on the appeal and in its decision, the Court of Appeals has allowed the waiver by

respondent's mother of all her rights as "widow" to preclude any consideration by the Court of her status which would include her subsequent ceremonial marriage to a third person during the lifetime of decedent, without benefit of a divorce. *In so doing, the Court of Appeals has affixed this waiver to defeat its consideration of the facts upon which the basic property rights of this petitioner depended. By giving this effect to the waiver of the alleged "widow" the Appellate Court under the forms of legal procedure deprived the petitioner of her property rights without due process of law as the Court of Appeals thereby refused to even consider the merits of her contention.** (Amendment V; Constitution of the United States). It has been held by this Court, in deciding jurisdiction in Fayerweather *v.* Ritch, 195 U. S. 276 where a contention was made that the state court's judgment was rendered without making a finding on one of the fundamental facts, at page 299:

> ". . . if it be true that the necessary result of the course of procedure in these courts was a denial of their rights . . . a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified . . . a case is presented . . ."

## III

The Court of Appeals stresses the point that petitioner assumed a heavy burden for a finding against the child on the issue of legitimacy (App. 15). However, it is the law in this jurisdiction that the presumption of legitimacy arises from the proof of the basic fact that the child was born during the lawful marriage of the mother. See Note, 46 Georgetown Law Journal, 477 (1958).

Likewise in our code, Title 18, Section 196, antenuptial children are legitimated after *marriage* and the subsequent acknowledgment of the issue by the father.*

* Emphasis supplied.

In the record of this case there is evidence by affidavit from the respondent's mother (J.A. 39) who states the relationship began illicitly and his father, the decedent (J.A. 53) which amounts to a denial by the parents that they were ever married. *In this case, as argued in our first question, no marriage existed, as the presumption of a valid common law marriage was not and rebutted by the subsequent ceremonial marriage of the mother. If there were no marriage, the very root upon which the presumption of legitimacy rests, lawful wedlock, is destroyed. Petitioner contends that to have presumed legitimacy of respondent where there was no lawful marriage, was error, and a misconstruction of our local statute on legitimation of children entitling her to the issuance of this Writ of Certiorari.**

## CONCLUSION

It is respectfully submitted that the questions raised herein indicate serious errors concerning: a question which a large number of courts of appeals have decided contrary to the holding in this case; in construing a waiver by one party in such manner as to deprive another party of his property rights without due process of law; and in misconstruction of our local law on legitimation of children all of which warrant the exercise by this court of its supervisory jurisdiction by issuance of a Writ of Certiorari.

Respectfully Submitted

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M. WILHELMINA JACKSON
*Of Counsel*

---

* Emphasis supplied.

## APPENDIX

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 14296

GLADYS L. MATTHEWS, Administratrix of the Estate of Theodore A. Matthews, APPELLANT,

v.

PHILLIP MATTHEWS, Administrator, Estate of Samuel Matthews, deceased, APPELLEE.

---

Appeal from the United States District Court for the District of Columbia

---

Decided June 26, 1958

*Miss M. Wilhelmina Jackson* for appellant.

*Mr. Carlisle E. Pratt* for appellee.

Before FAHY, DANAHER and BURGER, *Circuit Judges*.

PER CURIAM: The District Court appointed appellee administrator of the Estate of Samuel Matthews, deceased. An amended petition for letters of administration had listed the appellee and his sister as children of the late Samuel Matthews, one Irene Matthews as his widow and Theodore Matthews as his brother. The appellant, as conservator of the brother's estate, filed a petition seeking the revocation of the appointment of appellee and for the appointment of herself instead. Appellant's petition was dismissed with prejudice, and her motion for reconsideration was denied. This appeal followed.

The District Court entered findings of fact that Irene Matthews and the decedent entered into a valid common

law marriage in the District of Columbia in 1921 and that Bernice Matthews Gordon and appellee Phillip Matthews are the legitimate issue of that marriage. Appellant has attacked these findings.

The District Code provides that a "child" may be appointed administrator of the estate of a parent.[1] The Code further provides that "if there be neither widow or surviving husband, nor child . . . brothers and sisters shall be preferred."[2] Appellant has argued that there could not have been a valid common law marriage in 1921, but there was no legal impediment to the marriage of the decedent and Irene Matthews. The court found that they lived together openly and notoriously as man and wife until their separation in 1931. Phillip Matthews had lived with his parents until the date of their separation. Appellant has assumed a very heavy burden, for a finding against the child on the issue of legitimacy could properly be made only in a most exceptional case, we have pointed out.[3] Appellant relies upon the fact that some years after the separation Irene Matthews entered into a ceremonial marriage with another but we are not called upon to adjudicate her status. The record shows that she executed a waiver of all claim as "widow" to the estate of her common law husband. In other respects there are conflicts both as to the claims of the respective parties and as to the evidence offered in connection therewith. We are satisfied that the findings by the trial judge are not without substantial support in the record. They certainly have not been demonstrated to be clearly erroneous.

The orders of the District Court are

*Affirmed.*

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[1] D. C. CODE § 20-24 (1951).

[2] *Id.* § 20-207.

[3] Howard v. Howard, 72 App.D.C. 145, 147, 112 F.2d 44, 46 (D.C. Cir. 1940); cf. Thomas v. Murphy, 71 App.D.C. 69, 107 F.2d 268 (D.C. Cir. 1939). And see Note, *Presumptions in Domestic Relations in the District of Columbia*, 46 Geo. L.J. 474 (1958).

Filed June 26 1958 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958

Admin. 92,745

No. 14,296

Gladys L. Matthews, Administratrix of the Estate of Theodore A. Matthews, Appellant,

v.

Phillip Matthews, Administrator, Estate of Samuel Matthews, deceased, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Fahy, Danaher and Burger, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the orders of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant his taxable costs on this appeal, and have execution therefor. Dated: June 26, 1958.

Per Curiam.